IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 09-0659

C.A. GRENZ,
Petitioner and Appellee,

-vs-

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,
Respondent and Appellant,

and JOHN AND ANGELA HEITZ,
Respondents.

On Appeal from the Montana Sixteenth Judicial District Court, Garfield County
The Honorable Gary Day, Presiding
Garfield County District Court Cause No. DV-17-2008-2911

APPELLANT STATE OF MONTANA'S REPLY BRIEF

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I. INTRODUCTION

The above-captioned matter requires this Court to determine whether the State Board of Land Commissioners possesses the power to have adopted ARM 36.25.125(3), which requires a willing buyer and a willing seller to agree upon the transfer and sale of moveable improvements upon State grazing leases. Appellee, Mr. Grenz, a former lessee, mistakenly contends that the "willing buyer – willing seller" rule for moveable improvements in ARM 36.25.125(3) is legally defective. Mr. Grenz's legal contentions are in error because:

> 1) former grazing lessees are obligated by the Montana Constitution to remove their moveable improvements from a grazing lease at the end of the lease under Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Com'rs, 296 Mont. 402 at 418, 989 P.2d 800 at 809 (1999);
>
> 2) the procedures described in Title 77, Chapter 6, Part 3 of the Montana Code Annotated do not expressly require a new lessee to purchase moveable improvements from a former lessee; and
>
> 3) ARM 36.25.125(3) is consistent with the State Land Board's broad constitutional powers and rulemaking authority.

II. ARGUMENT

A. Former lessees are obligated to remove their moveable improvements from a grazing lease at the end of the lease.

Former State grazing lessees are constitutionally prohibited from keeping their moveable improvements upon State trust lands after the termination of the lease without further compensation pursuant to this Court's pronouncement in

Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Com'rs (Montrust I), 296 Mont. 402 at 418, 989 P.2d 800 at 809 (1999). Montrust I held that former lessees are not authorized to keep their moveable improvements upon the trust lands after the termination of their agriculture or grazing lease by reason of the State's fiduciary mandate in Article X, §11 of the 1972 Montana Constitution to obtain the full market value for the use of State trust lands. If the moveable improvements are to remain upon State school trust lands after the termination of a lease, the former lessee must pay the State for that privilege.

The Montana legislature did not enact procedural statutes in conflict with this constitutional ruling. Mr. Grenz has misread §77-6-302(3), MCA, which provides that:

> (3) Upon the termination of a lease, the department may grant a license to the former lessee to remove the movable improvements from the land. Upon authorization, the movable improvements must be removed within 60 days or they become the property of the state unless the department for good cause grants additional time for the removal. The department shall charge the former lessee for the period of time that the improvements remain on the land after the termination of the lease.

Although subsection (3) of §77-6-302, MCA, appears to speak merely in permissive terms, it reflects the underlying constitutional mandate in Montrust I that moveable improvements may not be kept by a former lessee upon State school trust lands without additional payment by the former lessee.

In the above-captioned matter:

1) there is no indication in the Administrative Record that Mr. Grenz has paid anything to the Department for the privilege of keeping his moveable improvements upon the State school trust lands after the termination of his lease;

2) there is no indication in the Administrative Record that the Department granted Mr. Grenz any extension of time to remove his moveable improvements; and

3) it is acknowledged that the new grazing lessees, the Heitzes, were not willing to purchase certain moveable improvements. See, Administrative Record at AR-12.

Given these facts, it is indisputable under the constitutional directive in Montrust I, that Mr. Grenz had no right to continue to leave his moveable improvements upon the State trust lands without additional payment or permission to do so. Thus, Mr. Grenz need not be compensated for those moveable improvements left upon a terminated State lease which lack both a willing seller and a willing buyer.

B. The procedures described in Title 77, Chapter 6, Part 3 of the Montana Code Annotated do not expressly require a new lessee to buy moveable improvements from a former lessee.

The interpretation of the State lease improvement valuation statutes in Title 77, Chapter 6, Part 3 of the Montana Code Annotated is more nuanced than Mr. Grenz will admit in his Answer Brief. Largely, this stems from Mr. Grenz's plain reading of the statutes without reference to the constitutional status of the State

Land Board, the fiduciary duties of the State Land Board, and the legislative history and circumstances surrounding the enactment of these statutes.

The individual sentences in §77-6-302, MCA, cannot be interpreted as individual unqualified directives. Instead, all of the provisions in the Statute need to be harmonized with the statutory procedures set forth in Title 77, Chapter 6, Part 3 of the Montana Code Annotated, as well as with the Constitutional authority of the State Board of Land Commissioners. Section 77-6-302, MCA, provides that:

> **77-6-302. Compensation for improvements -- actual costs.** (1) Except for the improvements described in 77-1-134, prior to renewal of a lease, the department shall request from the lessee a listing of improvements on the land associated with the lease, including the reasonable value of the improvements. This information must be provided to any party requesting to bid on the lease. Except for the improvements described in 77-1-134, when another person becomes the lessee of the land, the person shall pay to the former lessee the reasonable value of the improvements. The reasonable value may not be less than the full market value of the improvements.
>
> (2) If the former lessee is unable to produce records establishing the reasonable value or if the former lessee and the new lessee are unable to agree on the reasonable value of the improvements, the value must be ascertained and fixed as provided in 77-6-306. The former lessee shall initiate this process within 60 days of notification from the department that there is a new lessee. The department notification must include an explanation of the requirements of 77-6-306. Failure to initiate the process within this time period results in all improvements, except those described in 77-1-134, becoming the property of the state.
>
> (3) Upon the termination of a lease, the department may grant a license to the former lessee to remove the movable improvements from the land. Upon authorization, the movable improvements must be removed within 60 days or they become the property of the state unless the department for good cause grants additional time for the removal. The department shall charge the former lessee for the period of time that the improvements remain on the land after the termination of the lease.

Grenz erroneously argues that the language in §77-6-302(1), MCA, which provides that: ". . . when another person becomes the lessee of the land, the person shall pay to the former lessee the reasonable value of the improvements", consists of an absolute obligation of the new lessee to pay for all improvements, whether those improvements are moveable or immoveable.

First, Mr. Grenz's legal interpretation, itself, is internally inconsistent and illogical. Mr. Grenz's context-free selective literal reading of §77-6-302(1), MCA, to the exclusion of all other legal considerations, provides no enlightenment for this Court. To Mr. Grenz, §77-6-302(1), MCA, appears to require the former lessee to generate a list of the value of the improvements and it requires the new lessee to pay the value of the improvements. If the former lessee is obligated to generate a list of the value of the improvements, and the new lessee is obligated to pay it, Grenz's selective literal interpretation of §77-6-302, MCA, would direct that no arbitration of improvement values could ever take place. However, the enactment of §77-6-306, MCA, which provides for arbitration of disputes between the former and new lessees, indicates a contrary interpretation of §77-6-302, MCA. From the co-existence of §77-6-306, MCA, one can conclude that: a new lessee's obligation to purchase is clearly qualified, not absolute, and greater administrative discretion and flexibility exists within the valuation process than Mr. Grenz would

like to admit. A context-free selective literal legal interpretation only serves to misdirect the Court. If such a legal interpretation makes "bad music", this Court need not listen to it.

Second, given this Court's directive in Montrust I, that former lessees cannot make free use of State trust lands for the storage of their moveable improvements; and, given that those moveable improvements must be removed upon the termination of the lease, it would be illogical to conclude that a new lessee is obligated to pay for something that is not even authorized to be present upon the lease premises. Statutes cannot be interpreted in such a manner. This Court held in State v. Heath, 321 Mont. 280, 291, 90 P.3d 426, 434 (2004) that:

> It has long been a rule of statutory construction that a literal application of a statute which would lead to absurd results should be avoided whenever any reasonable explanation can be given consistent with the legislative purpose of the statute. *See Chain v. Dept. of Motor Vehicles,* 2001 MT 224, ¶ 15, 306 Mont. 491, ¶ 15, 36 P.3d 358, ¶ 15; *Darby Spar. Ltd. v. Dept. of Revenue* (1985), 217 Mont. 376, 379, 705 P.2d 111, 113; *State ex rel. Special Road Dist. No. 8 v. Mills* (1927), 81 Mont. 86, 96, 261 P. 885, 889.
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> ¶ 33 In sum, the ambiguity in the plain wording of [the statute] . . . the resulting uncertain directives . . . and the potentially absurd consequences of the application of [the statute] . . . , beckon us loudly to look beyond the words of the statutes and to inquire as to the Legislature's purpose in enacting the 1999 amendments. It is abundantly clear that proper interpretation of the statutes here requires more than "simply to ascertain and declare what is in terms or in substance contained therein." Section 1-2-101, MCA. "[W]hen the plain meaning of a statute is subject to more than one reasonable interpretation ... we will examine the legislative history to aid our interpretation." *State v. Legg,* 2004 MT 26, ¶ 27, 319 Mont. 362, ¶ 27, 84 P.3d 648, ¶ 27.

Id.

See also, State ex rel. Williams v. Kemp, 78 P.2d 585, 586 (Mont. 1938)("In construing a statute, the intention of the Legislature is the controlling consideration, and, to ascertain the reason and meaning of particular provisions of doubtful meaning, courts may recur to the history of the times and the cause or necessity influencing the passage of the act".); Infinity Ins. Co. v. Dodson, 302 Mont. 209, 223-224, 14 P.3d 487, 496 (2000)("In construing a statute, this Court must also read and construe each statute as a whole so as to avoid an absurd result and to give effect to the purpose of the statute".); and McKinnon v. Western Sugar Co-Op. Corp., 355 Mont. 120, 126, 225 P.3d 1221, 1225 (Mont.,2010)("this Court has refused to abide by such a strict, formalistic approach to statutory interpretation and ha[s] readily applied the maxim 'The law respects form less than substance.'...". Section 1-3-219, MCA".)

The legislative history of the State lease improvement valuation statutes, which consists of the background and events leading to the amendment of §77-6-302, MCA, reflects this Court's requirement in Montrust I that moveable improvements be removed from leases after the termination of the lease. There is no specific language in Title 77, Chapter 6, Part 3 of the Montana Code Annotated in conflict with this treatment of moveable improvements upon State grazing leases.

C. ARM 36.25.125(3) is consistent with the State Land Board's broad constitutional power and its recognized rulemaking authority.

The District Court in the above-captioned matter erred when it determined that the adoption of ARM 36.25.125(3) exceeded the authority of the State Land Board. The Board possesses the broad authority under Article X, Section 4 of the 1972 Montana Constitution to:

> . . . direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law.

Further, the legislature has delegated rulemaking authority over State trust lands to the State land board under

> **77-1-209. Leasing rules.** The board may prescribe rules relating to the leasing of state lands as it considers necessary in order that the use and proceeds of these lands may contribute in the highest attainable measure to the purposes for which they are granted to the state of Montana. The rules should prescribe a procedure for setting all fees and rental rates for the use of state lands for any purpose. The procedure should establish provisions for notice, public comment, public hearings, and appeal.

The adoption of specific procedures for the transfer of moveable improvements upon leases of State trust lands are an essential part of the leasing, direction, and control of trust lands – which are the sole constitutional responsibilities of the State Land Board. Accordingly, the State Land Board has the authority to adopt a rule that requires a willing buyer and a willing seller for the sale and transfer of

moveable improvements upon State trust lands unless Montana statutes unmistakably prohibit the State Land Board from doing so.

In Duck Inn, Inc. v. Montana State University-Northern, 285 Mont. 519, 949 P.2d 1179 (1997) this Court considered whether the State Board of Regents possessed a sufficient delegation of authority to rent university facilities to the public. This Court determined that because the Board of Regents was created by the Montana Constitution, the Board possessed independent authority to lease university facilities. This Court held that:

> . . . the regents have authority over the Montana university system which is independent of that delegated by the legislature. Article X, Section 9 of the Montana Constitution expressly creates the board of regents as a constitutional entity and vests the government and control of the Montana university system therein. Indeed, the regents are given "full power, responsibility, and authority to supervise, coordinate, manage, and control the Montana university system...." Art. X, Sec. 9, Mont. Const. Under a similar circumstance involving independent authority, the United States Supreme Court has held that limitations on legislative delegation are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie* (1975), 419 U.S. 544, 556-57, 95 S.Ct. 710, 717, 42 L.Ed.2d 706, 716 (citation omitted). We adopt the Supreme Court's reasoning with regard to legislative delegations of power to the board of regents in Montana.

Duck Inn, Inc. v. Montana State University-Northern, 285 Mont. 519, 526, 949 P.2d 1179, 1183 (1997)

As stated in Giacomelli v. Scottsdale Ins. Co., 354 Mont. 15, 22, 221 P.3d 666, 671 (Mont.,2009) an ". . . administrative rule will be considered invalid only upon a clear showing that the regulation adds requirements which are contrary to the statutory language or that it engrafts additional provisions not envisioned by the legislature".

The State Land Board possesses the clear authority to adopt ARM 36.25.125. The Legislature gave the Board the ability to adopt "rules relating to the leasing of state lands as it considers necessary". Section 77-1-209, MCA. Section 2-4-305, MCA, provides that "[w]henever by ... statute a state agency has authority to adopt rules ... a rule is not valid or effective unless it is: (a) consistent and not in conflict with the statute; and (b) reasonably necessary to effectuate the purpose of the statute." Section 2-4-305(6), MCA. ARM 36.25.125 meets both those requirements. The "willing buyer – willing seller rule" provides a workable and pragmatic process for the sale of moveable improvements consistent with the Board fiduciary duties. The State Land Board clearly and specifically possesses the rulemaking authority to require a willing buyer and willing seller for moveable improvements on State trust land grazing leases. Section 2-4-305(3), MCA.

was well within the discretion of the State Land Board to reject a process that would create unreasonable or impractical impediments to the efficient leasing of State school trust lands. Consequently, when valuing the improvements upon the transfer of State Grazing lease 10,159, DNRC had no need to include a valuation of the movable improvements for which there is not a willing seller and a willing buyer.

Thus, the Department respectfully requests that this Court reverse the District Court's August 7, 2009, ruling in this matter, and uphold the Department's valuation of the improvements upon State of Montana Agricultural and Grazing Lease No. 10,159.

DATED this 3rd day of June, 2010.

By: Tommy H. Butler

Tommy H. Butler
Special Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d), M.R.App.P., I certify that this brief is printed with a proportionally spaced Times New Roman text typeface of 14 points, is double-spaced and the word count calculated by Microsoft Word software for Windows is not more than 5,000 words and not averaging more than 250 words per page, excluding the Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPELLANT, STATE OF MONTANA'S REPLY BRIEF was served by mail, postage prepaid, upon the following on the 3rd day of June, 2010:

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